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Opinion on transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. KWAME LOUDER, Defendant and Respondent.	B265170 (Los Angeles County Super. Ct. No. TA105295)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County. Laura R. Walton, Judge. Reversed and remanded with directions.

Jackie Lacey, District Attorney, John K. Spillane, Chief Deputy District Attorney, Pamela Booth, Assistant District Attorney, and Matthew Brown, Deputy District Attorney, for Plaintiff and Appellant.

Ricardo D. Garcia, Public Defender, Mark Harvis, Deputy Public Defender, for Defendant and Respondent.

Passed in the 2014 General Election, Proposition 47 reclassified as misdemeanors certain offenses that had previously been classified as felonies or "wobblers."[1] (*People v. Buycks* (2018) 5 Cal.5th 857, 870–871 (*Buycks*).) The initiative also added Penal Code[2] section 1170.18, which permits persons previously convicted of felony offenses that had become misdemeanors under Proposition 47 to have those felony convictions resentenced or redesignated as misdemeanors. (*Id*. at p. 871.)

Following his conviction in 2009, respondent Kwame Louder was sentenced to 15 years in prison, consisting of 3 years for a second degree burglary conviction (§ 459; count 1), plus 12 years for 12 prison priors subject to the one-year enhancement under section 667.5, subdivision (b). After the passage of Proposition 47, Louder successfully petitioned to have four of his prior convictions reduced to misdemeanors.[3] He then filed a

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[1] A wobbler is a special class of crime that, because it involves conduct of varying degrees of seriousness, may be charged or punished as either a felony or a misdemeanor. (*People v. Park* (2013) 56 Cal.4th 782, 789.)

[2] Undesignated statutory references are to the Penal Code.

[3] The sentence on his conviction for felony receiving stolen property (§ 496; count 2) had been "merged" into the sentence on count 1. (§ 654.) After the passage of Proposition 47, Louder also sought to have both felony convictions reclassified as misdemeanors. The trial court granted the request only as to count 2. The court recalled and set aside the felony sentence on count 2 and imposed a misdemeanor sentence of 365 days in county jail with credit for 365 days served. The court ordered

request for relief under Proposition 47 entitled, "Motion for Resentencing," in which he argued that four of the 12 prior prison term enhancements must be stricken and his sentence on his 2009 conviction reduced by four years, because those four felony convictions had been reclassified as misdemeanors. In June 2015, the superior court granted the motion and reduced Louder's sentence to 11 years. Later that month he was released from prison because he had finished serving his now reduced term.

The People appealed the superior court's postjudgment order. In an opinion filed March 10, 2016, this court reversed, holding that the reduction of the prior convictions to misdemeanors pursuant to Proposition 47 had not changed their status as one-year prison priors. The Supreme Court granted review and held the case pending a ruling in *People v. Valenzuela*, S232900. *Valenzuela* was consolidated with *Buycks*, S231765, and one other case. The high court decided *Buycks* in July 2018 and transferred Louder's case back to this court "with directions to vacate [the] decision and to reconsider the cause in light of *People v. Buycks* (2018) 5 Cal.5th 857. (Cal. Rules of Court, rule 8.528(d).)"

Buycks holds that a prior felony conviction that has been reduced to a misdemeanor pursuant to Proposition 47 may not be used to impose a one-year enhancement under section 667.5, subdivision (b). (*Buycks*, *supra*, 5 Cal.5th at pp. 889–890.) However, the high court also held that a reduction of a prior felony conviction to a misdemeanor will invalidate a one-year

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Louder released from parole and no further probation was imposed.

enhancement based on that conviction only in cases that were not final when Proposition 47 took effect. (*Id*. at p. 895.) "A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired."[4] (*Id*. at p. 876, fn. 5.)

Here, Louder's conviction and sentence were final 90 days after this court issued the remittitur on May 28, 2010, in Louder's direct appeal. Proposition 47 did not take effect until November 2014. Because Louder's 2009 judgment was final long before Proposition 47's enactment, Louder cannot benefit from our Supreme Court's decision in *Buycks*, and we must conclude that the superior court erred in striking four of Louder's one-year prison priors.

Although Louder is not entitled to relief under Proposition 47 pursuant to *Buycks*, both parties urge this court to remand the matter to the superior court to determine whether he is entitled to relief under *People v. Tanner* (1979) 24 Cal.3d 514 (*Tanner*). In *Tanner*, the trial court erroneously struck a gun-use allegation, granted probation, and sentenced Tanner to county

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[4] A petition for writ of certiorari from the United States Supreme Court must be filed within 90 days after the state criminal judgment becomes final. (See *Holbrook v. Curtin* (6th Cir. 2016) 833 F.3d 612, 613 [the Antiterrorism and Effective Death Penalty's "one-year statute of limitations began to run when [defendant's] conviction became final on August 23, 2010, 90 days after the Michigan Supreme Court denied his application for leave to appeal the adverse decision of the Michigan Court of Appeals"]; *Missouri v. Jenkins* (1990) 495 U.S. 33, 45 [90-day limit to petition for certiorari in a civil case is "mandatory and jurisdictional"].)

jail. Following reversal by the Supreme Court, Tanner was subject to a mandatory prison sentence. But the high court determined that a second incarceration, after Tanner had complied with the conditions of probation including one year in county jail, would be unjust. (*Id.* at pp. 521–522.)

The Supreme Court has since recognized that *Tanner* has been limited to those situations where equitable relief is particularly appropriate:

"Court of Appeal decisions [have] subsequently 'limited *Tanner* to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) "unusual circumstances" generate a "unique element" of sympathy, such that returning the defendant to jail "would be more than usually painful or 'unfair.' " ' " (*People v. Clancey* (2013) 56 Cal.4th 562, 586; *People v. Statum* (2002) 28 Cal.4th 682, 696–697, fn. 5.)

The determination of whether Louder meets these criteria cannot be addressed by this appellate tribunal because it requires the receipt of additional evidence. Accordingly, we agree with the parties that the matter should be remanded to the superior court to conduct a hearing on whether Louder has been living a law-abiding and productive life, and whether further incarceration would be unfair. Based on its findings, the superior court may then exercise its discretion under *Tanner* as appropriate.

DISPOSITION

The superior court's postjudgment order from which the People appealed is reversed. The matter is remanded to the superior court with directions to conduct a hearing to determine whether Louder has been living a law-abiding and productive life, and whether further incarceration would be in the interests of justice. Based on its findings, the superior court may then reinstate the original sentence of 15 years, or exercise its discretion under *People v. Tanner* (1979) 24 Cal.3d 514 and strike the four one-year prior prison term enhancements.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.